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## CONFERENCE PROCEEDINGS

**Mediterranean Legal Hybridity: Mixtures and Movements, the Relationship between the Legal and Normative Traditions of the Region**
**Malta, June 11-12, 2010**

## ARTICLES


- *Dutch Notaries: Do They Have a Future? How the Historical Foundations of the Civil Law Can Help Survive a Modern Crisis*..... Kees Cappon
- *A Jurilinguistic Study of the Trilingual Civil Code of Québec*..... Jimena Andino Dorato


## BOOK REVIEW


- *George Dargo, Jefferson's Louisiana: Politics and the Clash of Legal Traditions*..... Agustín Parise


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# FROM CAPITULATIONS TO UNEQUAL TREATIES: THE MATTER OF AN EXTRATERRITORIAL JURISDICTION IN THE OTTOMAN EMPIRE

Eliana Augusti*

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## ABSTRACT

In the nineteenth century, justice in the Ottoman Empire appeared to international jurists deeply corrupted and far from the Western model. European consular jurisdictions, as in the past, solved this embarrassment in the prevalent and private interest of Western States in order to control the Mediterranean area. This perpetrated abjuration to recognize an autonomous and sovereign Ottoman administration of justice in civil or criminal cases in which foreigners were involved continued, in spite of the fact that the Porte provided excellent examples of intersection, reception and appropriation of foreign models to construct a new legal system, and to transform society. This process of "westernization"

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or "modernization" formally started in 1839, by the Hatt Hümayün of Gülkhâne. In order to halt the contradictions derived from the coexistence of the last (French and English) treaties of commerce of 1838 and their confirmation of privileges and consular jurisdiction with the driven effort of Ottoman juridical reforms of *Tanzîmât* period, in 1840 in both Turkey and Egypt, mixed traders councils composed of local and foreign traders were established. In 1840 the "commercial board" was born in Turkey and, in 1848, European Powers holding capitulary privileges negotiated the formal recognition of mixed tribunals (which were regulated in 1873 and formally inaugurated in 1875). This embarrassing situation was getting worse and accumulating contradictions when in 1856, at the Congress of Paris, the Ottoman Empire was "admitted to participate in the advantages of European Public Law and system" (art. 7 of the Treaty). Thanks to those words, the logical preamble of consular jurisdictions and their extraterritoriality (mitigated by the "monstrous" compromise of mixed tribunals), formally failed. There was a need to investigate and redefine the paradigmatic declensions of sovereignty in the relations between European Powers and the Ottoman Empire during the nineteenth century.

## I. A SOVEREIGNTY IN ABEYANCE: PREMISE

Between the seventeenth and eighteenth century, sovereignty was perceived as a mutually recognized right of the states to exercise exclusive authority over particular territories. This was the Westphalian model, successively qualified by the jurists as the "ideal type" of sovereignty. It suggested the respect of the other state's sole authority in domestic affairs, the control over the flow of goods and bodies within each state's borders, and the establishment of relations as among equal states in the international system. It would be the reference paradigm for the later principle of non-intervention.

However, as Stephen Krasner underlined in 1999, this model often worked as an "organized hypocrisy," when there was no accurate correspondence to many of the entities that have been

regarded as states.[1] In several cases, states' sovereignty had been compromised by contracts and conventions, impositions and interventions. This was particularly clear, and paradoxically palpable, for the Sublime Porte: in the nineteenth century there was something invalidating and compromising the declension of the "ideal type" of the Ottoman sovereignty.[2]

Antoine Pillet, in 1899, summarized his general perceptions on this topic in an interesting, and as yet not very well-known, essay on *Les Droits Fondamentaux des États dans l'ordre des rapports internationaux*. The work opened with a precise statement which showed traces of James Lorimer's attitude:[3]

> Il semble que . . . une question préalable s'impose d'abord à l'examen: les États ont-ils, dans leur rapports fondamentaux, des droits qui existent par eux-mêmes, . . . des droits qui résultent . . . de la seule coexistence d'États civilisés (car nous ne nous occuperons que de ceux-là) . . . ?

Only civilized states were owners of fundamental rights, and parts of the family of nations. In particular, about the "droit d'égalité," Pillet added:

> Les États ne sont pas égaux entre eux . . . D'abord, il n'existe aucune égalité de droits entre les États civilisés et les États non civilisés ou moins civilisés. Les premiers se gèrent constamment dans leurs rapports avec les seconds comme des supérieurs chargés de la mission de les faire entrer de gré ou de

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1. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 69 (Princeton University Press, Princeton, 1999).

2. *See id*. at 20; Aida A. Hozic, *The Paradox of Sovereignty in the Balkans*, *in* THE STATE OF SOVEREIGNTY: TERRITORIES, LAWS, POPULATIONS 245 (Douglas Howland & Luise S. White eds., Indiana University Press, Bloomington, 2009) (on the Westphalian sovereignty); Amin Saikal, *Westphalian and Islamic Concepts of Sovereignty in the Middle East*, *in* RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA 75 et seq. (Trudy Jacobsen et al. eds., Ashgate Publishing Limited, Aldershot 2008) (about the difference between the Westphalian meaning of the concept and the complex Islamic understanding of the phenomenon of "sovereignty").

3. JAMES LORIMER, 1 THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 101 (W. Blackwood & Sons, Edinburgh and London 1883).

> force dans les voies de la civilisation : à ce titre ils s'arrogent envers eux certains droits de direction, de contrôle et parfois d'administration que ceux-ci ne possèdent en aucune façon à leur égard. Entre la condition des uns et la condition des autres, il y a inégalité fragrante et cette inégalité est en la matière la véritable base de leurs relations.[4]

States are not equal. Civilization is the measure of this non-equality. There are civilized and uncivilized states: the gap of civilization conditions the real nature of their relations based on a true dimension of non-equality. Civilized states have rights of direction, control and administration over uncivilized states: this is their mission in order to lead the latter to civilization.

This idea, shared also by John Westlake and Thomas Joseph Lawrence,[5] clashed with the regulative ideal of an inclusive political pluralism of the international society and built, instead, its assumptions on a hierarchical ordering of it.[6] The constitution of the different legal status of an "uncivilized state," in fact, definitely solved the conflict between formal juridical equality of sovereign states and persistent power inequalities, also legitimating the unequal juridical language of the relations among them.[7] The "uncivilization" caused a *deminutio* of sovereignty for the uncivilized states and, consequently, permitted (in front of a silent international law) the interference of civilized states in their domestic and foreign affairs. Evidently, this was not a reciprocal and consensual process. The so-called "development" of the international law of the twentieth century removed the

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4. ANTOINE PILLET, RECHERCHES SUR LES DROITS FONDAMENTAUX DES ÉTATS DANS L'ORDRE DES RAPPORTS INTERNATIONAUX ET SUR LA SOLUTION DES CONFLITS QU'ILS FONT NAITRE 6 (Paris, 1899).

5. JOHN WESTLAKE, 1 INTERNATIONAL LAW 321-322, (Cambridge University Press, Cambridge 1910); THOMAS JOSEPH LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 59 (Macmillan, London, 1905).

6. GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 25 (Cambridge University Press, Cambridge 2004).

7. *See* Hozic, *supra* note 2, at 255; SIMPSON, *supra* note 6, at 336 et seq.; Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT'L L.J. 476, 518 (2010); Gustavo Gozzi, *The Particularistic Universalism of International Law in the Nineteenth Century*, 52 HARV. INT'L L.J. 73, 76-77 (2010).

subordination of sovereignty and the absence of reciprocity as marking dimensions of that non-equality, and only underlined this aspect of the duress of the relations.[8] Consequently, in line with nineteenth century European colonial politics, an automatic equation of colonial projects with the formal assumption of sovereignty by European Powers over non-European territories and peoples began to work.[9]

Next to the deficit of civilization, as Aida Hozic has recently noticed, one of the reasons for the paradox of a "non-sovereign sovereignty" of the Ottoman Empire in its unequal relations with European Powers in the nineteenth century was that it had been frequently violated in the name of the sovereignty itself.[10] Carl Schmitt said that the sovereign was the one who decided on the exception.[11] According to Giorgio Agamben and his suggestions on the logical antinomies of sovereignty, the sovereign's ability to suspend laws created those "juridically empty" states of exception. The states of exception had two essential criteria of individualization: the absolute necessity and the temporary state.[12] Since there were two levels of sovereignty—one, artificial and anomalous, of the civilized states over the "uncivilized" Ottoman Empire, and the other, original and inadequate, of the Ottoman Empire itself over its own territory—two suspensions of the Ottoman order were possible.

First, the Ottoman Empire, as a "geographical exception" of a Christian and civilized Europe, underwent a *deminutio majestatis* which determined a corresponding sovereign extension (*garentia*) of European Powers' sovereignty on it. The absolute necessity was to grant peaceful trade and judicial protection for the Western

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8. Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW 335, 380 (2005).

9. The modern idea of unequal treaties was an "integral part of 'imperialism' and 'colonialism.'" GERRIT GONG, THE STANDARD OF CIVILIZATION IN INTERNATIONAL SOCIETY 66-67 (Clarendon Press, Oxford, 1984).

10. Hozic, *supra* note 2, at 247.

11. *See* Carl Schmitt, LE CATEGORIE DEL "POLITICO." SAGGI DI TEORIA POLITICA (Gianfranco Miglio & Pierangelo Schiera eds., Il Mulino, Bologna, 1972).

12. GIORGIO AGAMBEN, STATO DI ECCEZIONE 19 (Bollati Boringhieri, Torino, 2003).

peoples in transit or resident in the Ottoman territories; the temporary state of this necessity was determined by the Porte's process of gradual appropriation of international rules and its adequacy to the Western standard of civilization. The presence of both criteria provoked a suspension of the Ottoman juridical order:[13] those "juridically empty" states of exception were resolved by European intervention and consular jurisdiction.

In the second place, the absolute necessity to manage the matter of Christian subjects and foreigners, resident or in transit on its territories, and the temporariness of the gradual process of their assimilation, led the Ottoman Empire itself to act on its residual sovereignty and to operate a suspension of its juridical order. By a "truce," such as a temporary suspension of the political system towards the idolaters, the Ottoman sultans could grant Christians all the benefits of dialogue. This was the meaning of the old system of capitulations, of which the unequal treaties of the nineteenth century were the direct legacy.[14]

In my opinion, this dualistic representation is the final aspect of an Ottoman "fantastic" sovereignty that needs to be investigated in relation with the jurisdiction problem:[15] how was Ottoman sovereignty still held believable in face of the flagrant violations of its norms and in face of the logical antinomies of its constitutive principles operated by capitulations and unequal treaties? How was it possible to reconcile this state of subordination with the activation of the formal procedures for admission and participation of the Ottoman Empire to the European Concert of the nineteenth century? And what was the role of international law?

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13. This was a temporariness induced by the encouraged notion that only by emulating Western modes of governance polities on the periphery might be admitted into the family of nations. *Cf.* EDWARD SAID, ORIENTALISMO. L'IMMAGINE EUROPEA DELL'ORIENTE 78 et seq. (Stefano Galli ed., Feltrinelli, Milano, 2006).

14. *See* Craven, *supra* note 8, at 344; Eliana Augusti, *The Christian Matter and the Ottoman Empire: the Language of Compromise in the 19th Century*, *in* TURNING POINTS AND BREAKLINES 64 (Szabolcs Hornyák et al. eds., 4 Jahrbuch Junge Rechtsgeschichte, M. Meidenbauer, München, 2009).

15. Hozic, *supra* note 2, at 248.

## II. DIALOGUE BY CAPITULATIONS

"As a corollary of the principle of sovereignty, states are deemed to have jurisdiction over their own territory."[16] "Extraterritorial jurisdiction is a provisional system which should be abandoned as and when the conditions justifying its adoption and application have ceased to exist."[17] In these two passages, Aida Hozic and Alexander Wood Renton, in different times and places, locate all the elements of the matter of extraterritorial jurisdiction in the Ottoman Empire in the nineteenth century (sovereignty, jurisdiction, territory). The two criteria of extraterritoriality (temporariness and necessity) implicitly appear as states of exception.

In the nineteenth century international trade was the ancillary route towards the consolidation of old, and the construction of new, international relationships among states in the Mediterranean area. On the one side European, and Christian, Powers; on the other side the inevitable Muslim interlocutor, the Ottoman Empire and its differences. The foreign merchants had uncertain status within the Ottoman dominions where strategic Mediterranean places were. To move in this area under suitable conditions and security guarantees, European Powers needed common useful provisions. This *jus commune* of the Mediterranean-trade-foreigner was first based on the old regime of capitulations. Since the sixteenth century, Western states obtained these unilateral concession acts, by which privileges were recognized, from sultans.[18] Normally, capitulations included a grant of immunity from the local jurisdiction and subjection to one's consular jurisdiction as long as the foreign–and above all Christian–merchants lived in small communities in the ports (the so-called "farms")[19] and made proper provisions for the regulation

16. Hozic, *supra* note 2, at 255.

17. Alexander Wood Renton, *The Revolt against the Capitulary System*, 15 J. OF COMP. LEG. & INT'L L. 222 (1933).

18. *See* GABRIEL BIE RAVNDAL, THE ORIGIN OF THE CAPITULATIONS AND OF THE CONSULAR INSTITUTION (Books LLC, New York, 2009).

19. Normalmente erano designate le città e i porti, dove i cristiani potevano impiantare le loro fattorie e risiedere per ragioni di commercio. Queste fattorie erano zone o quartieri distinti dalla città, talora chiusi, dove si trovavano le abitazioni degli

of their affairs.[20] As George Williams Keeton noticed in 1948, the feature of "unilateralism" of conceded privileges was not surprising: when, in fact, the first capitulations were granted by the Porte, the possibility of Turkish Muslim traders visiting or residing in European countries did not seem to have been considered. There was thus no real need of reciprocal recognitions. The state of things seemed to change in 1740, when France attained the attachment of capitulary privileges in an international treaty, also signed by the sultan. In this way, and for the first time, France turned the concessions into a contract binding in a synallagmatic way the Porte to it.[21] Then, thanks to an extensive clause, the so called most-favourite-nation clause, not only France, but all European nations could enjoy contractual (and sanctioned) benefits of the imported capitulary text.

Far from being contrary to other bilateral treaties or grants of European international law, capitulations hence became and remained until the twentieth century a common and normal incident of commerce with countries of non-Christian and non-European civilization.[22] European Powers accepted and consolidated capitulary exceptional regimes as functional to their aims, because they obtained the juridical guarantees for their citizens; capitulations protected their merchants, trade, contracts and cases; they established in the strategic specific places of Mediterranean Western presence and controlled, from a privileged inner position, their Muslim interlocutor. But even if capitulations

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> stranieri ed erano costruiti i loro stabilimenti commerciali, magazzini, con chiesa, cimitero e il consolato. Ogni Nazione aveva la sua fattoria, e questa era una specie di Stato nello Stato, quindi ognuno nel proprio recinto godeva la più ampia libertà di culto, di commercio, di giurisdizione.

FRANCESCO FERRARA, MANUALE DI DIRITTO CONSOLARE 17-18 (Cedam, Padova, 1936).

20. "Capitulations désignant les conventions consulaires avec l'empire ottoman et, par extension, avec les autres états de l'Orient." ALPHONSE RIVIER, 2 PRINCIPES DU DROIT DES GENS 37 (A. Rousseau, Paris, (1896).

21. PAUL PRADIER-FODÉRÉ, 2 TRAITÉ DE DROIT INTERNATIONAL PUBLIC EUROPÉEN & AMÉRICAIN SUIVANT LES PROGRÈS DE LA SCIENCE ET DE LA PRATIQUE CONTEMPORAINES 689-691 (A. Durand & Pedone-Lauriel eds., Paris, 1885).

22. George Williams Keeton, *Extraterritoriality in International and Comparative Law*, 72 RECUEIL DES COURS 283, 351-352 (1948).

were an irremissible instrument for praxis and commercial intents, they were a taboo for European scholarship, which remained silent and did not give space to an in-depth study on them, their regime, and on the connected subject of consular jurisdiction, where the cases regulated by capitulations also fell.

The complex task to reconstruct and understand was left to nineteenth and twentieth century scholarship, which inserted these evaluations into the more complex phase of the building of International Law as a discipline. It had to find an answer to the origin, the need to maintain and the impossibility to abolish this privileged system of provisions for foreigners (merchants or not), called capitulations, still in force in the Muslim lands. I want to propose and briefly analyze three argumentative criteria used by scholars, and their correlative contradictions: a) immiscibility/personality; b) extraterritoriality; c) nationality.

## III. UNDERSTAND AND LEGITIMIZE: THE IMMISCIBILITY, EXTRATERRITORIALITY AND NATIONALITY CRITERIA

As natural consequence of the so-called principle of immiscibility or of the personality of law,[23] Western and non-Muslims foreigners were considered "outsiders" of *Shar'ia*, in which only the believers could participate.[24] In a Christian state, *i.e.*, in a state belonging to the European civilization, a foreign resident, merchant or not, was subject to local courts like the indigenous peoples (with only the exception of diplomats): there was a kind of *jus commune* on the ground of which the foreigner was like a *subditus temporarius* and, for this reason, he was put on the same level as a state citizen to exercise his civil rights and enjoy his administrative protection. He was excluded only from the enjoyment of political rights and duties. Instead, in the Ottoman dominions, by capitulations, he possessed a privileged status. He

23. Edgar Turlington, *Treaty Relations with Turkey*, 35 YALE L.J. 326, 330 (1926). The main feature of the *siyar*, *i.e.*, the rules for the Muslims/non-Muslims foreigner relations, was its nature of personal and non-territorial law. MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS. SHAYBANI'S SIYAR 62, (The Johns Hopkins Press, Baltimore, 1996).

24. Enid Hill, *Comparative and Historical Study of Modern Middle Eastern Law*, 26 AM. J. COMP. L. 279, 290 (1978).

had to comply with his own national laws, he was exempt from the jurisdiction of the Ottoman courts and he referred to his own consular one; he was, in other words, treated differently from Ottoman subjects.[25] This fact was not, at the time these "agreements" were made, deemed to be in any way derogatory to the sovereignty and dignity of the sultans. Sovereignty and jurisdiction were at that time generally regarded–in Europe scarcely less than in the Levant–as personal rather than territorial; and, particularly in view of the Islamic doctrine of the immiscibility of Moslem and Christian communities and the radical divergence between the legal system of the Ottoman Empire and the Western Powers, it was considered to be the most natural and proper arrangement for foreigners in the Ottoman territories to be subject exclusively to the laws and jurisdiction of their own sovereigns, acting through their ministers and consuls.

The capitulary "gracious" system was thus definitely a substantial part of the public law of the Ottoman Empire, because it was applied to all foreigners in the country and also regulated Ottomans' contacts with foreigners within the Empire. It was also confirmed as an atypical part of the positive law of Western states:[26] the sultans awarded capitulations only on the applicants' explicit promise to keep peaceful relations with them, and on the understanding that any violation of the promise might lead to a unilateral revocation of the privileges.[27]

When from this original position Western juridical tradition started moving towards a state dimension of law and a territorial dimension of sovereignty, however, it became more complex to justify and legalize the need to maintain these personal privileged agreements, resorting to confessional (and in this sense, personal) argumentations. From the fracture produced by the Protestant Reform and the Westphalia Acts, confessional aspects had been

25. ÉDOUARD PHILIPPE ENGELHARDT, LE DROIT D'INTERVENTION ET LA TURQUIE 13, (A. Cotillon & Co. ed., Paris, 1880).

26. Maurits H. Van den Boogert, *The Capitulations and the Ottoman Legal System. Qādis, Consuls and Beratlıs in the 18th Century*, *in* 21 STUDIES IN ISLAMIC LAW AND SOCIETY 6, (Rudd Peters & Bernard Weiss eds., Brill, Leiden-Boston, 2005).

27. *Id*. at 7.

put out of the international discourse:[28] international law was among sovereign states; each state was sovereign on its own territory; states recognized themselves and each other as sovereign states on their territories.[29] Common religion was not anymore a remarkable and conditioning connotation of international relations among states and, for this reason, it was replaced by a more convincing paradigm of a shared civilization. The Muslim principle of immiscibility and of the personality of law did not work well anymore, but contradictions remained.[30]

Even if the open transition in seventeenth-nineteenth centuries from the *Jus Publicum Europaeum* to international law had started changing the way in which the international relations among proclaimed non-confessional states had to be defined, and even if the growth of commercial demand looked for new criteria to be regulated, in the nineteenth century religion still influenced the European approach to Muslim states, and all the doubts about their "un-civilized" systems of justice remained.[31] The Ottoman system, in particular, appeared deeply corrupted and far from the Western model. Its theocratic system negatively conditioned European perception of the Porte, and let one conclude for an auto-exclusion, an auto "mise au ban de la civilisation" of the Empire.[32] The rights of presence, control, police, inspection and

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28. Luigi Nuzzo, *Un mondo senza nemici. La costruzione del diritto internazionale e il controllo delle differenze*, 38 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 1311-1335 (2009).

29. Parlare di rapporti internazionali fra subbietti senza sovranità territoriale, è accozzare parole senza significato. Non sarebbe esatto dire: lo Stato ha la sovranità territoriale; è sufficiente dire: lo Stato è persona del diritto internazionale; l'analisi di questa persona poi ci dimostra la esistenza di una sovranità territoriale.

CARLO GHIRARDINI, LA SOVRANITÀ TERRITORIALE NEL DIRITTO INTERNAZIONALE 53 (,P. Fezzi & C. Cremona, 1913).

30. *But see* NASIM SOÜSA, THE HISTORICAL INTERPRETATION OF THE ORIGIN OF THE CAPITULATIONS IN THE OTTOMAN EMPIRE (J. Hopkins University Press, Baltimore, 1930).

31. Le bon sens suggère tout d'abord la supposition que sans doute en Turquie la magistrature n'offre point les garanties d'intégrité, d'impartialité et de lumière qui pour tout individu éloigné de son pays sont la première sauvegarde de sa liberté, de sa fortune, de son honneur et de sa vie.

Édouard Engelhardt, *La Turquie et les Principautés Danubiennes*, 13 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 535 (1881).

32. *Id.* at 537.

administrative intervention of the consuls' jurisdictional power as provided by conventions and used in the Christian countries, could not assure a "distribution tolérable de la justice."[33] For this reason, despite the general rule of a "pouvoir judiciaire des consuls nécessairement restreint, par le principe de la souveraineté territoriale, aux droits résultant des stipulations conventionnelles ou de l'usage consacré," in the Ottoman territories the consulars' power became something more: they could solve the embarrassment of the inadequate justice system in the prevalent and private interest of Western states.[34] The foreign consuls had jurisdiction over cases between their nationals as capitulations consecrated in the past "dans des termes si catégoriques que le gouvernement ottoman n'a jamais essayé de la contester." It was a *datum de facto* and *de jure*. Article 26 of the French Capitulation of 1740 said: "S'il arrive quelque contestation entre les Français, leurs ambassadeurs et leurs consuls en prendront connaissance et en décideront, selon leurs us et coutumes, sans que personne puisse s'y opposer."[35] The incompetence of the Ottoman tribunals for civil or criminal disputes between foreigners of the same nationality was absolute, *i.e.*, independent from the will of the parties; it was, André Mandelstam underlined, "d'ordre public."[36] The common and shared Western policy was confirmed: no renunciation of the old privileges was planned; consular jurisdiction had to keep working.

Facing the raising of territorial sovereignty, the old principle of personality seemed to transmit in a principle of extraterritoriality. In the rhetorical construction of international law, the consulates became "closed political centers" on foreign territory, just like states within the state. This exceptional regime was supported by the old *ratio* to find guarantees for foreigners where they were lacking. According to the principle of

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33. *Id.* at 535.

34. William Beach Lawrence, *Étude sur la juridiction consulaire*, 13 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 45 (1881).

35. Translated from the Turkish text by ANDRÉ MANDELSTAM, LA JUSTICE OTTOMANE DANS SES RAPPORTS AVEC LES PUISSANCES ETRANGÈRES 217 (A. Pedone, Paris, 1908). WILHELM G. GREWE, 2 FONTES HISTORIAE IURIS GENTIUM 72-73 (Walter de Gruyter, Berlin-New York, 1988) (In the same way the text of the first Franco-Turkish Capitulation of 1535, art. III).

36. MANDELSTAM, *supra* note 35, at 218.

extraterritoriality: first, foreigners enjoyed extraterritoriality in the sense that even if they were on the Ottoman territory, they were by *fictio* out of it, *i.e.*, *extra territorium*; second, they were considered as in their country, even if in fact they were not. In the twentieth century, this conception was deeply criticized when, among many exceptions, scholars noticed that the foreigner remained subject to the local laws anyway.[37] In despite of extraterritoriality, the privileged condition of a foreigner (and consular jurisdiction) was qualified as an exceptional status by which he remained under the territorial power of the residency state, but free from its coercive power. This was possible thanks to an express waiver of the state territorial sovereignty on him, and the consequent concession to the foreign national state to continue personal sovereignty over him.[38] In this sense, as someone said, already at the end of the nineteenth century, capitulations appeared as "negative servitudes" which connected the exceptional condition of foreigner from the old system of the personality of law, to the new one of nationality. "Les Capitulations et traités conclus avec la Turquie, le Japon, la Chine, la Perse et autres États asiatiques, consacrent ou établissent des servitudes négatives, lorsqu'ils disposent que les nationaux européens y seront soumis, non pas à la justice locale, mais à leurs propres consuls qui leur font l'application des lois de leur patrie."[39] In the Ottoman Empire, like in other non-Christian states, the principle of extraterritoriality was known and could work, granting to foreigner ministers and consuls a more or less extended civil and criminal jurisdiction. This grant did not undermine Ottoman foreign independence, but, as William Beach Lawrence stressed, "déroge à la règle universellement établie parmi les nations civilisées que 'les lois de police et de sûreté obligent tous ceux qui

37. About the relations between consular and local tribunals in the Ottoman Empire *cf.* FRANCESCO PAOLO CONTUZZI, 2 TRATTATO TEORICO-PRATICO DI DIRITTO CONSOLARE E DIPLOMATICO NEI RAFFRONTI COI CODICI (CIVILE, COMMERCIALE, PENALE E GIUDIZIARIO) E CON LE CONVENZIONI INTERNAZIONALI IN VIGORE 701 (Utet, Torino, 1911).

38. FERRARA, *supra* note 19, at 232.

39. PRADIER-FODÉRÉ, *supra* note 21, at 682.

habitant le territoire.'"[40] It was confirmed as an international exception limited to the Oriental case.

The phenomenon of foreigners' privileges in the Levant could be justified by international law with a third argumentative solution, too. As noted earlier, foreigners (and consuls) were privileged people subject to the territorial power of the state where they resided, but released from its coercive force.[41] This was possible because the Oriental state had waived its right of territorial sovereignty over them, allowing by capitulations or commercial treaties that personal sovereignty of foreigners' national state went on. According to this conceptualization, there was no need to simulate that the foreigner was where he was not, but that there was a national state which "followed" its citizens wherever they went, wherever he was (we can hear the echo of Pasquale Stanislao Mancini and of the principle of nationality).[42] The logical preamble to strengthen the suspension of Ottoman juridical order towards European citizens, the filter to move from the territoriality to nationality criteria was, once again, "civilization."

## IV. FROM CAPITULATIONS TO UNEQUAL TREATIES: THE LITERARY PLACES OF THE EXCEPTION

The basic principles of new international relations concerned the right of nations to independence, self-determination and equality. The latter, especially, was of particular importance to modern International Law: all states had "the same right to participate in the process of formulation of international law."[43] The states had to be entitled to take part in the drafting and conclusion of agreements that were of interest to them. This concept of equality was, of course, inferred from the idea of

40. LAWRENCE, ÉTUDES SUR LA JURIDICTION CONSULAIRE EN PAYS CHRÉTIENS ET EN PAYS NON CHRÉTIENS ET SUR L'EXTRADITION 105 (F.A. Brockhaus, Leipzig, 1880).

41. FERRARA, *supra* note 19, at 231-232.

42. Nuzzo, *Da Mazzini a Mancini: il principio di nazionalità tra politica e diritto*, 14 GIORNALE DI STORIA COSTITUZIONALE 174-180 (2007).

43. Ingrid Detter, *The problem of Unequal Treaties*, 15 INT'L & COMP. L.Q. 1069 (1966).

sovereignty. For sovereignty implied, *inter alia*, not equality of power, but legal equality, such as–as Ingrid Detter pointed out in 1966–that "states shall have had the same capacity to exercise their rights and to assume obligations."[44] In this respect, one did not always individuate the equality of states. There might a time that a state might find itself compelled into treaties with more dominating states, treaties which only favor the stronger of the parties, treaties which even sometimes are in conflict with the long-term national interest of the weaker state. Such treaties were often referred to as being "unequal."[45] This qualification of inequality was not accepted with favor by International Law, and this, as Matthew Craven has underlined, is for two reasons: the first was that the question of inequality in the context of treaty-making appeared incoherent. If on the one hand, in fact, every treaty could be a manifestation of inequality (in terms of a substantive lack of equilibrium in the respective burdens and benefits, and in terms of an unequal bargaining power of the contracting parties), on the other, a presumption of equality might exist, since equal "contractual" capacity of the parties was there.[46] The second reason was the passive and acquiescent assumption in the rhetorical construction of the International Law of the nineteenth century of the unequal relations between European Powers and non-European territories and peoples in the gradual process of empire building. Until that moment, the international relations among states were not equal, because of the effect of non-renounceable "colonial power" suggestions.[47] It was a society where many subjects were under the colonial protected nations systems, or they were formally independent, but substantially suffering the consequences of unequal treaties with the imperial

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44. *Id.* At 1070.

45. *Id.* According to Richard Horowitz, "Unequal treaties formed the international legal mechanism for defining semi-colonial relationships." They were unequal in several senses: "they were forced at gunpoint; they expressed the economic and political interests of [European Powers]; the key provisions, including extraterritoriality and restrictions on tariffs on foreign trade" and, they "were not reciprocal." Richard S. Horowitz, *International Law and State. Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century*, 15 J. WORLD HIST. 455 (2004).

46. Craven, *supra* note 8, at 337-338.

47. In this way also GUSTAVO GOZZI, DIRITTI E CIVILTÀ. STORIA E FILOSOFIA DEL DIRITTO INTERNAZIONALE 139 (Il Mulino, Bologna (2010).

powers. It was an "unequal" society.[48] Therefore, with the logical preamble that those treaties might be the best juridical literary place to regulate and safeguard the lives of nationals in countries lacking common standards of civilization, the more civilized states, as Pillet said, transferred the old capitulations' text into these special agreements on jurisdiction in countries where institutions were "inferior" or "different" from the civilization of most European and American States.[49] These ideas were reflected, in particular, in a series of agreements of an overtly non-reciprocal nature between the Great Powers and the "less civilized" Ottoman Empire. Confirmed as a state in an "Oriental sense,"[50] it was not allowed to participate in the European Concert and to share a common juridical conscience, but thanks to private treaties it could dialogue with Western Powers.[51] Where there was no common language, there was still the language of the strongest state, *i.e.*, the language of its policy, economy and moral obligations.[52] Transferring the capitulations' text into these treaties, *status quo* did not change and all the old conceded immunities, now guaranteed by enforceability of bilateralism, ended in the exception. Although capitulations were, as concession acts of the sultan's liberality, always potentially revocable and, for this reason, uncovered,[53] the system of agreement by unequal treaties

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48. Onuma Yasuaki, *When was the Law of International Society Born?–An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. HIST. INT'L L. 64 (2000).

49. Detter, *supra* note 43, at 1075-1076.

50. AUGUST WILHELM HEFFTER, LE DROIT INTERNATIONAL DE L'EUROPE, (fr. trans., Cotillon et fils, Paris, 1873), distinguished between Oriental and European State: "l'état oriental est celui de la résignation et du servage, dans le quel le despotisme ou l'oligocratie s'est alliée à la hiérarchie." *Id.* at 38.

51. This in accordance with the doctrinal shared principle by which:

> Le droit des gens . . . il ne s'applique dans toute sa plénitude et avec l'entière réciprocité qui est de sa nature qu'entre ces mêmes peuples [chrétiens]. Il est du reste aisé de comprendre qu'entre nations reconnaissant des dogmes religieux identiques ou sensiblement analogues, il se forme des idées communes de justice qui rendent possible la reconnaissance d'un ensemble de droits et de devoirs mutuels.

Antoine Pillet, *Le droit international public, ses éléments constitutifs, son domaine, son objet*, 1 REVUE GÉNÉRALE DE DROIT INT'L PUB. 24 (1894).

52. Nuzzo, *supra* note 28, at 1335.

53. Gustave Rolin-Jaequemyns, *Le droit international et la phase actuelle de la Question d'Orient*, 7 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 304 (1875).

would have guaranteed the contracting parties the enforceability of its terms and, in default of their execution, the application of a penalty to the transgressor. They were treaties of commerce and establishment, the treaties by which European Powers completed their good opportunity to improve the mechanism.

Related to the Ottoman Empire, the different way of Westerners to stuff the category of "sovereignty" with fluid contents clearly supplied a concrete need: their consciousness to work with something different persisted and legitimated the choice of suspension of a legal international order, to guarantee the best condition for foreigners residing or traveling in a territory which was outside the borders of the European juridical space.

## V. OTTOMAN EMPIRE: THE ELUSIVE SOVEREIGNTY AND THE GREAT EXPECTATIONS

Turan Kayaoğlu, in a provocative way, recently wrote of the "Ottoman Empire's elusive dream of sovereignty."[54] The perpetrated abjuration to recognize a real sovereign role of the Porte within the family of nations and an autonomous and sovereign Ottoman administration of justice in civil or criminal cases in which foreigners were involved, justified this "elusive" dimension of the dream. This was particularly difficult to support in consideration of the excellent examples of intersection and reception of foreign law with the construction of new legal systems and transformations of society that the Ottoman Empire realized in the nineteenth century.[55] I allude to the period of reforms, "modernization," and "westernization" of the Ottoman legal order (*Tanzîmât* period), conventionally started in 1839 by the Hatt Hümayün of Gülkhâne, the year after the signing of the unequal French and English treaties of commerce of 1838 (which confirmed foreigners' privileges and consular jurisdiction).

Some signs of Western distrust towards Ottoman justice were already present in 1820. Before the establishment of the consular tribunals, in fact, under a "convention verbale" among the

54. TURAN KAYAOĞLU, LEGAL IMPERIALISM: SOVEREIGNTY AND EXTRATERRITORIALITY IN JAPAN, THE OTTOMAN EMPIRE, AND CHINA 104 (Cambridge University Press, Cambridge, 2010).

55. Hill, *supra* note 24, at 288.

powers, a Mixed Judicial Committee (*Commission Judiciaire Mixte*) was instituted to try the civil disputes between foreigners of different nationalities. This was not a permanent committee, but it met every time a dispute arose. It was organized and convened by the Mission of the defendant which designated two judges. The third was appointed by the claimant. The decisions of the committee were not immediately enforceable, but needed the homologation of the consular tribunal of the defendant. This mixed system worked until 1864, when the Court of Appeal of Aix, in Provence, undermined its authority. The pronunciation, using the article 52 of the 1740's Capitulation and the reason of the absence of a written text to prove the real existence of the convention of 1820, declared that there was no obligation for the French to submit to the jurisdiction of the Mixed Committee. Then, there had been a misinterpretation of article 52 and its juridical value: it did not officially organize any ambassadors' jurisdiction to try the disputes between foreigners of different nationalities. Therefore, the Court pronunciation of 1864 gave a death blow to the Mixed Committees in favour of the consular tribunals.[56]

On the other hand, the reform period of the Empire could not be so seriously considered if in 1840 the commercial board of mixed traders councils was established in Turkey, and in 1848 European Powers holding capitulary privileges negotiated the formal recognition of them, composed of foreign, Muslim Ottoman, and non-Muslim Ottoman citizens.[57] After the introduction of the French Commercial Code as Ottoman Code of Commerce (1850), in 1873, at the Conference of Constantinople, the *Règlement d'Organisation Judiciaire* was adopted and mixed tribunals found their own Charter of regulation within the Empire:[58] they would be formally inaugurated in 1875, on June 28.

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56. MANDELSTAM, *supra* note 35, at 230-231.

57. About the institution of the tribunals cf. the references in Roma, 10.07.1890, Letter of the Italian Minister of Foreign Affairs to the Ambassador in Constantinople, n. 24390: *Nel 1848 la Porta istituì i Tribunali*, Archivo Storico Diplomatico del Ministero delgi Affari Esteri (ASDMAE), 63, b. 15 (1886-1894), f. 1, *Questioni relative all'Amministrazione della giustizia in Turchia (abolizione dei tribunal commerciali provinciali)*). According to Hill, the establishment of the tribunals was in 1847. Hill, *supra* note 24, at 299.

58. Renton, *supra* note 17, at 215.

According to Esin Örücü, "sometimes 'mixedness' can be the manifestation of a transition, sometimes it can be the final outcome of the process. 'Mixedness' is usually a result of historical accident and accidents can lead to unexpected outcomes along unexpected paths."[59] In the Ottoman case, this vocation to a mixed solution seemed to be more the final outcome than the transition moment of the process, especially if one considers the compromise dimension of mixed tribunals' establishment, and the transitional value of the umpteenth occurrence of the disturbed relations among European Powers and the Porte in the nineteenth century. I allude to the Congress of Paris of 1856: at the end of the Crimean War, in order to establish new conditions of peace in the Balkan area, the homonymous Treaty admitted the Ottoman Empire to participate in the advantages of European Public Law (art. 7).[60] Even if functional to European aims, the situation became embarrassing, as well as unusual and humiliating, for the Porte.[61] Thanks to that stipulation, the logical preamble of the unequal treaties and the theoretical framework to justify the maintenance of capitulary privileges and consular jurisdictions formally seemed to fail: it was inconceivable to preserve such a

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59. Esin Örücü, *What is a Mixed Legal System: Exclusion or Expansion?*, ELECTRONIC J. OF COMP. L. 12 (2008) *available at* http://www.ejcl.org (Last visited December 11, 2011).

60. TRAITÉ DE PAIX SIGNÉ À PARIS LE 30 MARS 1856 ENTRE LA SARDAIGNE, L'AUTRICHE, LA FRANCE, LE ROYAUME UNI DE LA GRANDE BRETAGNE ET D'IRLANDE, LA PRUSSE, LA RUSSIE ET LA TURQUIE AVEC LES CONVENTIONS QUI EN FONT PARTIE, LES PROTOCOLES DE LA CONFÉRENCE ET LA DÉCLARATION SUR LES DROITS MARITIMES EN TEMPS DE GUERRE 10 (Imprimerie Royale, Turin 1856).

> Art. 7. Sa Majesté le roi de Sardaigne, Sa Majesté l'Empereur d'Autriche, Sa Majesté l'Empereur des Français, Sa Majesté la Reine du Royaume-Uni de la Grande Bretagne et l'Irlande, Sa Majesté le Roi de Prusse et Sa Majesté l'Empereur de toutes les Russies déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert européens. Leurs Majestés s'engagent, chacune de son côté, à respecter l'indépendance et l'intégrité territoriale de l'Empire Ottoman, garantissent, en commun, la stricte observation de cet engagement, et considéreront, en conséquence, tout acte de nature à y porter atteinte, comme une question d'intérêt général.

*Id.*

61. Engelhardt, *supra* note 31, at 535.

strong discriminating marker among proclaimed allies.[62] During the Congress session of March 25, 1856, Alî Paşa, the plenipotentiary of the sultan, expressly denounced this discrepancy and asked for the abolition of capitulations and its corollaries which stood, he said, in the way of the renewal of the Ottoman state. For the first time, all the various forms of Western juridical (and judicial) immunities started to appear as an unjust ostracism by, and an unjust interference of, Western Powers.[63] The negotiating parties showed their solidarity, but the question stayed unanswered and they did not mention the subject in the Treaty. The natural incoherence of the formally declared admission of the Ottoman Empire to the International Society started revealing itself. It was clear that article 7 could not work–as some scholar noticed–as a turning point for international relations between Europe and the Ottoman Empire. On the other hand, if we consider

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62. "Even though a significant portion of the Empire was based *in* Europe, it cannot be said to have been *of* Europe." Thomas Naff, *The Ottoman Empire and the European States System*, *in* THE EXPANSION OF INTERNATIONAL SOCIETY 143 (Hedley Bull & Adam Watson eds., Clarendon Press, Oxford, 1984).

63. According to this perspective, the Ottoman power itself, at the end of the nineteenth century, started to promote the abolition of capitulations. Engelhardt, *supra* note 31, at 75-76. In Paris Alî Paşa said:

> Les privilèges acquis, par les capitulations, aux Européens, nuisent à leur propre sécurité et au développement de leurs transactions, en limitant l'intervention de l'administration locale ; que la juridiction, dont les agents étrangers couvrent leurs nationaux, constitue une multiplicité de gouvernements dans le gouvernement et, par conséquent, un obstacle infranchissable à toutes les améliorations.

France:

> Reconnais que les capitulations répondent à une situation à laquelle le traité de paix *tendra* nécessairement à mettre fin, et que les privilèges, qu'elles stipulent pour les personnes, circonscrivent l'autorité de la Porte dans des limites regrettables ; *qu'il y a lieu d'aviser à des tempéraments propres à tout concilier ; mais qu'il n'est pas moins important de les proportionner aux réformes que la Turquie introduit dans son administration de manière à combiner les garanties nécessaires aux étrangers avec celles qui naîtront des mesures dont la Porte poursuis l'application*.

That contest was not suitable to discuss and resolve the matter of capitulations. The contribution at the congress was considered as a "voeu" to deliberate in another place, very probable in Constantinople, about capitulations. In the meantime, they remained in effect. *Protocole n. XIV, Séance du 25 mars 1856*, in TRAITÉ DE PAIX SIGNÉ À PARIS LE 30 MARS 1856, at 102-104.

literally the passage of the "admission" in the text of the Treaty, the reference was only to an "admission to the advantages," not also to a mutual recognition and a concrete participation of the Porte to the European System.[64]

After Paris, the discussion on capitulations was postponed until a future date, when a multilateral conference on extraterritoriality would be held in Constantinople. The conference never took place.

The indifference of the European Powers to capitulations points to both their imperialistic aims, and their persistence in the consideration of residing Western co-nationals and non-Muslim *protégés* as a kind of fifth column within the Levant. All the forms of European interference with the domestic policy of the sultan appeared, instead, as a kind of "peaceful penetration" and contradictions remained.[65] That admission of the Ottoman Empire into European international society appeared to be necessary but "premature," because "it had not yet attained the standard of 'civilization' that would allow Europeans to accept Ottoman jurisdiction over Western foreigners."[66] For this reason capitulations might remain. So, article 7 of the Treaty of Paris could be read as a "precautionary rule" to an ambitious but young international law. Therefore, the misunderstandings remained strong due to the risk of interpretations that could read too much into the text. An example in this sense was the declaration of Keçecizade Mehmet Fuat Paşa (Grand Vizier and Minister of Foreign Affairs during the *Tanzîmât* period) who, in 1858, noted:

> La Porte élève la juste prétention de voir cesser de fait un ostracisme qui a cessé de droit depuis le congrès de Paris, et elle se croit pleinement

64. *Cf.* Augusti, *The Ottoman Empire at the Congress of Paris, between new Declensions and old Prejudices*, *in* CROSSING LEGAL CULTURES 503-517 (Laura Beck Varela et al. eds., 3 Jahrbuch Junge Rechtsgeschichte, M. Meidenbauer, München, 2009).

65. Renton, *supra* note 17, at 219. According to Samim Akgönül, "le système des 'protégés' deviant sourtout au 19e siècle un moyen pour les puissances occidentales d'avoir un œil sur la politique de la Sublime Porte." SAMIM AKGÖNÜL, MINORITÉS EN TURQUIE. TURCS EN MINORITÉ. REGARDS CROISÉS SUR L'ALTÉRITÉ COLLECTIVE DANS LE CONTEXTE TURC 68 (Isis, Istanbul, 2010).

66. KAYAOĞLU, *supra* note 54, at 111-112.

> autorisée à protester contre le maintien de privilèges qui la privent des avantages essentiels du droit public moderne auxquelles elle a été appelée à participer en vertu du traité du 30 mars 1856.[67]

Scholarly scrutiny was obviously needed. At that time, the most important academic organ of international law was the *Institut de droit international*. On September 10, 1887, during the plenary session, the objective was communicated : the composition of a new commission with the task of "Rechercher les réformes désirables dans les institutions judiciaires actuellement en vigueur dans le pays d'Orient."[68] It took office in the Lausanne session of 1889. De Blumerincq, Carathéodory Efendi, Engelhardt, Féraud-Giraud, Ferguson, De Labra, De Martens, Perels, Renault, Rolin-Jaequemyns, Torres-Campos, Traver Twiss were the jurists responsible to investigate about the matter.[69]

As long as the jurists tried to organize international law in this manner, capitulations, unequal treaties, consuls and mixed courts were confirmed and appeared the irremissible instruments in the hands of Europe to force the Ottoman Empire to its decline, depriving from the inside the last shape of its sovereignty. This happened in 1878, when all the exceptional system of immunities by capitulations and unequal treaties was once and for all expressly confirmed by another Treaty.[70] Minds would not change for

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67. ANONYMOUS, LA TURQUIE DEVANT L'EUROPE 23 (E. Dentu, Paris, 1858).

68. Alphonse Rivier, *Notice historique sur l'Institut de droit international, sa fondation et sa première session, Gand 1873, Genève 1874, in* INSTITUT DE DROIT INTERNATIONAL. ANNUAIRE (1877); Bureau de la Revue de Droit International, Gand 1877 [repr. Schmidt Periodicals Gmbh, Bad Feilnbach 1994], at 11-16. About the Institute *cf.* Luigi Nuzzo, *Disordine politico e ordine giuridico. Iniziative e utopie nel diritto internazionale di fine Ottocento, in* 2, MATERIALI PER UNA STORIA DELLA CULTURA GIURIDICA, 319-338 (2011); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 39-41 (Cambridge University Press, Cambridge, 2002); ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, NEUVIÈME ANNÉE 1887-1888 14 (1888).

69. ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, DIXIÈME ANNÉE 1888-1889 15 (1889).

70. Art. 8, *Traité signé à Berlin, le 13 juillet 1878, entre la France, l'Allemagne, l'Autriche-Hongrie, la Grande-Bretagne, l'Italie, la Russie et la Turquie, in* A. DE CLERCQ, XII RECUEIL DES TRAITÉS DE LA FRANCE 321 (A. Durand & Pedone-Lauriel, Paris 1880). The article was proposed at the preliminary session of June 24, 1878, by the Italian minister Luigi Corti, on

seventy years. After the memorandum of September 9, 1914, by which the Ottomans stressed to European Powers the incompatibility of extraterritoriality with territorial jurisdiction and national sovereignty (with a further enumeration of injustices and humiliations suffered), and the rejection of Austria and Germany of an Ottoman unilateral abolition of extraterritoriality, the Treaty of general relations concluded at Lausanne (August 6, 1923) designed to re-establish the consular and commercial relations of the Contracting Parties, and to regulate the conditions of the intercourse and residence of the nationals of each of them on the territory of the other "in accordance with principles of international law, and on the basis of reciprocity." In conformity with the avowed object of the Treaty, the Contracting Parties, in art. 2, declared the capitulations concerning the *régime* of foreigners in Turkey, together with the economic and financial system resulting from the capitulations, "to be completely abrogated;" and in art. 30 they agreed that "from the coming into force of the new treaty the treaties formerly concluded between [Contracting Parties] and the Ottoman Empire shall absolutely and finally cease to be effective."[71] At Lausanne, as Kayaoğlu has underlined, "Turkish dreams of putting Western citizens and commercial interest under its jurisdiction materialized."[72] In reality, this was only the start of another phase of declensions and perturbations of the Ottoman "hanging" sovereignty.

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behalf of the French, Italian and Austro-Hungarian plenipotentiaries. The first draft provided: "Les immunités et privilèges des sujets étrangers ainsi que la juridiction et le droit de protection consulaires, tels qu'ils ont été établis par le Capitulations et usages, resteront en pleine vigueur," *Protocole n. 5 (Séance du 24 juin 1878), in id.* at 202. In the same session, Benjamin Disraeli, Lord of Beaconsfield, the British Prime Minister, stressed how inappropriate it was to spend that time in the capitulations' discourse, still under review: "il ne faudra pas les sauvegarder si elles sont inutiles; il y aurait lieu, sans doute, de leur donner une force additionnelle dans le cas contraire; mais l'impression de S. Exc. est qu'elles sont destinées a disparaître." In reality, capitulations were preserved, and not only as a reference in the treaty, but in the law-relations with the countries of Christendom until 1923. *Protocole n. 5 (Séance du 24 juin 1878), in id.* at 214.

71. TURLINGTON, *supra* note 23, at 326.

72. KAYAOĞLU, *supra* note 54, at 134.